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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID NICK GARCIA, Defendant and Appellant.	B203547 (Los Angeles County Super. Ct. No. BA323264)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Modified and, as modified, affirmed with directions.

Charles Roger Khoury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Nick Garcia appeals from the judgment entered following his convictions by jury on count 3 – possession of heroin for sale (Health & Saf. Code, § 11351) and count 4 – possession of methamphetamine for sale (Health & Saf. Code, § 11378), with admissions that he suffered 12 prior felony convictions (Pen. Code, § 667, subd. (d)) and two prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for nine years. We affirm the judgment.[1]

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that about 6:10 p.m. on May 23, 2007, Los Angeles General Services Police Officers Javier Barragan and Luis Ortega were on patrol in Elysian Park. The area of Elysian Park was known for high drug usage and sales. While on patrol, two motorists told the officers about a Chevrolet Tahoe SUV in the Buena Vista Meadows area. The motorists described a handgun, and described a suspect inside the Tahoe. Barragan and Ortega went to a Buena Vista Meadows parking lot where they met Los Angeles General Services Police Officer Victor Corrasco and other officers.

Barragan saw the Tahoe in the parking lot. Two males were standing outside the driver's side of the Tahoe. Barragan testified Johnny Perez was seated in the Tahoe's driver's seat and appellant was seated in the "passenger's seat." The four persons appeared to be conversing. Perez matched the suspect description. Police detained Perez and appellant, escorted them to a sidewalk, and searched them for weapons.

Perez and appellant were seated at a curb, and could not see from that location what was occurring in the Tahoe. Perez and appellant were seated on the driver's side of the Tahoe and police were searching the Tahoe on its passenger side.

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[1] On August 21, 2008, appellant filed a petition for a writ of habeas corpus (B210134) and, on September 4, 2008, this court ordered that his appeal and the petition be concurrently considered. The petition will be the subject of a separate order.

Barragan and other officers searched the Tahoe, looking for a handgun. Barragan saw a handgun's handle in a compartment located behind the driver's seat. Barragan seized the handgun. It was a replica handgun which matched the motorists' description of a handgun.

Barragan testified he located a camouflage case under a rear passenger seat. Appellant apparently had been sitting in the front passenger seat. The camouflage case contained heroin paraphernalia, including eight hypodermic needles. A small, black plastic cylinder was attached to the case. The cylinder contained eight balloons inside of which were 2.14 grams net weight of heroin. Photograph E depicted the balloons. Barragan testified "the items found in the vehicle were, I guess, placed with the defendant due to his statements that the vehicle belonged to him."

During cross-examination, appellant asked Barragan whether appellant admitted possession of "The items in question, both the [photograph] in H.[2] and the [photograph] in E." Barragan replied, "He stated that the vehicle belonged to him. He stated where these items were recovered, the property belonged to him." According to Barragan, appellant did not say that the "items . . . inside those" were his.

Barragan testified that appellant said he was aware of the secret compartment (which we discuss later), and that appellant said he owned and possessed an unlocked tan metal safe "where all of the items were recovered." Barragan also testified appellant admitted owning all property in the Tahoe. Barragan opined at trial that the heroin and methamphetamine were possessed for sale.

Officer Victor Corrasco and his partner were the last officers to arrive at the scene. When Corrasco arrived, appellant was sitting on the curb about five to ten feet from the front of the Tahoe. Corrasco testified he searched the Tahoe, looking for a handgun, because the "The call came out as an ADW, a gun call."

While searching the Tahoe, Corrasco found, in its front compartment on the passenger side, a hidden compartment near a heating duct. Corrasco opened the hidden

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[2] We refer to photograph H below.

compartment and found inside a cylinder containing less than .01 grams net weight of methamphetamine. He also found a plastic container inside of which were 20 small plastic baggies containing a total of 5.62 grams net weight of methamphetamine. Photograph H depicted those baggies. Corrasco also found 42 empty plastic baggies inside the hidden compartment. Corrasco discovered 56 unused, empty plastic baggies in the glove compartment and two $100 bills under the front center console.

Corrasco testified he searched the "rear portion of the vehicle behind the third row." Corrasco testified there was a storage compartment, and appellant had a lot of clothing and duffel bags. Corrasco found a scale in one duffel bag located in the rear of the Tahoe. Corrasco also found in the rear of the Tahoe a closed but unlocked metal safe. The safe contained a scale, a plate, a plastic baggy, and a vial, each of which contained white crystallized powder residue.

Appellant waived his *Miranda* rights and told Corrasco that the Tahoe was appellant's car. Corrasco, who had not told appellant that Corrasco had found a hidden compartment, and who had not told appellant anything about what Corrasco had found, asked appellant if there were any other hidden compartments in the Tahoe. Appellant initially replied, "only the one [you] found." Corrasco asked appellant what appellant meant. Appellant then denied it was a hidden compartment and explained he used the heating duct as a compartment.

During cross-examination, Corrasco opined that someone "sitting in the driver's side" would be able to reach over and get to the hidden compartment. It appeared to Corrasco that appellant had been living in the back of the Tahoe. Corrasco found photographs in the duffel bags in the back of the Tahoe. Corrasco thought appellant said the photographs depicted appellant's family.

According to Corrasco, appellant said the tan metal box was appellant's and that it was locked. Corrasco testified "I did ask him if the stuff in the back was his prior to searching it and he said it was his." Carrasco also testified he asked appellant if "[t]he stuff in the back of the vehicle was his and he said yes." Appellant denied the methamphetamine was his.

2. *Defense Evidence.*

In defense, Thomas Soriano testified as follows. Soriano was appellant's employee. He was also hired as a driver for appellant and drove him around about five days a week in a Tahoe. When appellant hired Soriano to be appellant's driver, appellant said Soriano was driving because of appellant's medication.

As far as Soriano knew, the Tahoe belonged to appellant's mother, who was the registered owner of the vehicle. There were three keys to the Tahoe. Soriano had one key, but did not know who had the other two. Appellant drove the Tahoe once in awhile, but normally did not drive because of his medication. Persons other than appellant and his mother had access to the Tahoe, depending upon who was driving. Appellant allowed other people to stow in the back of the Tahoe items which did not belong to appellant, and Soriano put items which did not belong to appellant in the back of the Tahoe.

Soriano knew appellant was arrested about May 23, 2007, but the first time Soriano told anyone that he drove appellant around was September 4, 2007, one day before Soriano testified at the trial. Prior to September 4, 2007, Soriano told appellant's family members that there were items not belonging to appellant that were being stored in the Tahoe, but Soriano did not tell police about such items.

During cross-examination, Soriano testified that some of the things in the Tahoe at certain points belonged to appellant. The prosecutor asked Soriano if, sometimes, appellant had some of his own personal things in the car. Soriano replied, "Yes, it's his car."

Appellant, who had suffered multiple convictions for armed robbery and assault with a firearm, and who was in prison from 1986 to 1997, testified as follows. Appellant did not drive frequently. He hired people to drive him because he took medication that made him drowsy and his vision was impaired. Soriano had acted as appellant's driver for about four years. Appellant was familiar with drug use and sales, and considered himself to be a drug expert. Perez told appellant that Perez had a "[v]ery severe" drug addiction problem. Appellant gave Perez part-time work to help him raise money to pay for a rehabilitation program.

About noon on May 23, 2007, Perez drove appellant to a hospital and left him. About 4:30 p.m., appellant called Perez to pick him up. Perez arrived with a friend named Marco. Perez was seated in the driver's seat. Appellant then sat in the front passenger seat, and Marco sat in the back seat.

Perez asked to stop at Elysian Park, and the three went there, arriving about 5:00 or 5:30 p.m. Appellant left to use the restroom, then returned and entered the Tahoe. Marco and another male were standing outside the driver's door and talking to Perez. Marco was speaking Spanish, which appellant did not speak that well. Appellant was not paying attention to what the three were saying. No more than two minutes later, police arrived. Perez, Marco, and the other male became very nervous. Appellant said, " 'Don't worry. We're not doing nothing.' " Police ordered Perez and appellant to exit the vehicle.

Appellant was made to lie prone behind the Tahoe. Appellant was later escorted to a curb about 20 to 30 feet from the driver's side of the Tahoe. When police searched the Tahoe, every door on the vehicle was open. En route to the curb, appellant saw police searching the Tahoe. In particular, appellant saw Corrasco searching under the dashboard on the passenger's side. Corrasco had his hand "underneath the dashboard in the cover that covers the heating duct." Appellant could also see portions of the search being conducted when he was seated at the curb.

None of the officers showed to appellant the hidden compartment to which they had been referring. Appellant said he saw it "when [an officer] was searching." Appellant saw police pull open a compartment on the passenger side.

Corrasco showed appellant drugs, asked if they belonged to appellant, and appellant replied no. Corrasco asked appellant if he had any secret compartments in the vehicle. Appellant did not know that, under the glove compartment, there was an area which could contain items. Appellant denied to Carrasco that there were any secret compartments in the vehicle.

Police showed appellant a tan safe box which police had recovered from the vehicle. Appellant told police that the box belonged to him, it was a company safe, and

he used it to carry payroll. Appellant thought the box was empty. Appellant was not asked if the vehicle was his, and he did not volunteer that it was his vehicle. However, appellant heard someone else "volunteer." As far as appellant knew, the vehicle was registered to his mother.

Appellant was not aware of any plastic replica guns inside the vehicle. Police displayed such a replica gun at the scene and asked each person if it was his. Appellant testified that someone "volunteer[ed] ownership" of the item. The $200 was appellant's wages. The camouflage bag did not belong to appellant, but he believed he knew to whom it belonged. Appellant denied telling police he was selling narcotics or possessed the recovered narcotics, denied selling narcotics on May 23, 2007, and denied possessing narcotics.

During cross-examination, appellant testified that everything Perez owned was in the Tahoe that day. Appellant testified that on May 21, 2007, he let Perez put Perez's belongings in the back of "my truck," i.e., the Tahoe. The prosecutor asked how long had those items been in "your" vehicle, and appellant replied they had been there for two days prior to his arrest. Appellant presumed the duffel bags contained Perez's clothing and personal belongings. However, appellant never looked through them, even though, according to appellant, Perez was a heavy drug user. Appellant claimed his conviction for assault with a firearm involved a toy gun.

The following occurred during cross-examination of appellant: "Q . . . Isn't it true, [appellant], that the officers asked you on scene if you had ever been arrested for drugs? [¶] A No, I was not asked that question. [¶] Q You don't recall Officer Corrasco asking you if you had ever been arrested for drugs and that your response was 'no'? [¶] A That was my answer to that question."

Appellant testified that the question which had been posed to him was posed by Corrasco, and the question had been whether appellant was ever convicted of a drug offense. Appellant had been arrested, but not convicted, for a drug offense. Appellant also testified that on May 21, 2007, Perez lived in a shack on a hillside being ravaged by fire. Soriano and appellant helped put Perez's belongings in the Tahoe.

3. *Rebuttal Evidence.*

In rebuttal, Corrasco testified as follows. When Corrasco first began his search of the Tahoe, as well as when he found the hidden compartment, appellant was sitting on the curb, about five to ten feet from the left side of the Tahoe. The Tahoe's doors were open. Appellant said the property in the vehicle, as well as the tan metal safe, were his. According to Corrasco, appellant did not say that the safe was a company safe.

Ortega testified he was near appellant when appellant sat on the curb. When appellant was seated, his head level was well below the window level of the Tahoe. Appellant did not walk by the Tahoe while it was being searched. Ortega was standing a couple of feet from appellant while he was seated at the curb, and Ortega could not see what Corrasco was doing in the Tahoe. Ortega testified he believed all four doors of the vehicle were open, then testified he did not recall, and subsequently testified that just the driver's side door was open. It was possible all four doors were open. Appellant and the other suspects were sitting towards the front of the Tahoe such that they would see the Tahoe's open door, but not inside the Tahoe.

We will present additional facts below where pertinent.

CONTENTIONS

Appellant claims the trial court erred by failing to instruct sua sponte on appellant's third-party culpability defense. Respondent claims the trial court should have imposed an additional state surcharge, state court construction penalty, and court security fee.

DISCUSSION

1. *The Trial Court Did Not Err by Failing to Instruct Sua Sponte on Third-Party Culpability.*

a. *Pertinent Facts.*

The reporter's transcript reflects that, immediately after jury argument, the court indicated to the jury that the court would instruct the jury shortly. The transcript then reflects that, outside the presence of the jury, the following occurred. The court indicated the jurors had left. The court asked the prosecutor to provide one instruction which had

not been included: Judicial Council of California Criminal Jury Instructions (2007) CALCRIM No. 373. After a brief colloquy between the prosecutor and court, the prosecutor indicated she would provide the instruction. The record does not reflect that appellant objected to the court's proposal to give CALCRIM No. 373.

During the court's formal charge to the jury, the court gave CALCRIM No. 373. As given, the instruction read, "The evidence shows that (another person/other persons) may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged." The record does not reflect that appellant objected to the actual giving of CALCRIM No. 373 to the jury.

The court, using CALCRIM No. 220, instructed on the burden of proof beyond a reasonable doubt and the presumption of innocence. The court did not instruct on third-party culpability.

b. *Analysis.*

Appellant claims that, since the trial court gave CALCRIM No. 373 to the jury, the court erred by failing to instruct sua sponte on third-party culpability. We reject the claim.

There is no dispute that, absent CALCRIM No. 373, the trial court had no duty to instruct sua sponte on third-party culpability. (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) The fact that the court gave CALCRIM No. 373 does not alter the analysis. Both CALCRIM No. 373 and a third-party culpability instruction involve third parties who may be liable for a crime for which the defendant is on trial. But the similarities end there.

A third-party culpability instruction focuses on the significance of a third party's alleged past acts offered as exculpatory evidence during a criminal prosecution of the defendant. CALCRIM No. 373 focuses, not on the significance of a third party's alleged past acts offered as evidence (exculpatory or otherwise) during a criminal prosecution,

but on the significance of the facts that (1) the third party may not be currently participating in the criminal prosecution of the defendant, and/or (2) may not have been, or might not be, criminally prosecuted. The fact that CALCRIM No. 373 instructed on an issue irrelevant to third-party culpability did not impose upon the trial court an otherwise nonexistent duty to instruct sua sponte on such culpability.

Finally, the court instructed the jury on the presumption of innocence and the burden of proof beyond a reasonable doubt. There is no real dispute that someone possessed for sale the narcotics at issue. The real issue is whether appellant was the person. Barragan testified as follows. Appellant told Barragan, who found some of the narcotics in the Tahoe, that the Tahoe belonged to appellant. Appellant stated that, "where these items were recovered, the property belonged to [appellant]." Appellant said he was aware of the Tahoe's secret compartment. Appellant also said he owned and possessed the unlocked tan metal safe. Police recovered narcotics paraphernalia from the safe.

According to Corrasco, who found much of the narcotics in the Tahoe, appellant told Corrasco that the Tahoe was appellant's car. The People presented evidence that, even though appellant did not see Corrasco search the hidden compartment, appellant immediately knew what Corrasco was referring to when Corrasco mentioned it. Appellant provided conflicting statements, evidencing consciousness of guilt, on the issue of whether he knew about the hidden compartment.

It appeared to Corrasco that appellant had been living in the back of the Tahoe. Corrasco found photographs in the duffel bags in the back of the Tahoe, and Corrasco thought appellant said the photographs depicted appellant's family. Appellant said the tan metal box (apparently the same item as the safe) was his. Appellant told Corrasco that the "stuff in the back" of the Tahoe was appellant's.

Appellant presented evidence that he let Perez, a person with a "[v]ery severe" drug addiction problem, act as a driver for appellant. Soriano waited until the day before he testified before he told anyone that he had acted as a driver for appellant. When the prosecutor asked Soriano if, sometimes, appellant had some of his own personal things in

the car, Soriano replied, "Yes, it's his car," providing evidence that at least some of the items in the vehicle, as well as the vehicle itself, were appellant's. Soriano conceded appellant sometimes drove the Tahoe. The jury reasonably could have discounted appellant's testimony since it was impeached by his prior convictions. However, even appellant referred to the Tahoe as "my truck." He presented conflicting testimony on the issue of whether police asked him if he had ever been arrested for drugs.

Moreover, the jury heard appellant argue that Perez, not appellant, was guilty of the offenses. Appellant's counsel argued, "What we're saying is that the narcotics did not belong to Mr. Garcia." Appellant's counsel argued that appellant tried to help Perez but "ended up being betrayed by Johnny Perez, who took the car away from [appellant] for approximately a few hours and did God knows what."

The jury also heard appellant's counsel argue, "I'm not going to get into any discussion about whether or not the items found were for sale. Those all belonged to Mr. Johnny Perez." Appellant then closed by asking the jury to find appellant not guilty. Any trial court error in failing to instruct on third-party culpability does not warrant reversal of the judgment. (Cf. *People v. Abilez, supra,* 41 Cal.4th at pp. 517-518; *People v. Earp* (1999) 20 Cal.4th 826, 888.)

2. *An Additional State Surcharge, State Court Construction Penalty, and Court Security Fee Must Be Imposed.*

The trial court imposed a $50 laboratory analysis fee pursuant to Health and Safety Code section 11372.5, subdivision (a). The trial court was therefore required to impose (1) an additional $10, as a 20 percent state surcharge (*People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257; Pen. Code, § 1465.7, subd. (a)), plus (2) a state court construction penalty of $15 (*People v. McCoy, supra*, at p. 1254; Gov. Code, § 70372, subd. (a)(1)).

The court also imposed one Penal Code section 1465.8, subdivision (a)(1) court security fee of $20. However, because the jury convicted appellant on two counts, the court should have imposed two such fees, one for each conviction. (Pen. Code, § 1465.8, subd. (a)(1).)

DISPOSITION

The judgment is modified by imposing (1) a Penal Code section 1465.7, subdivision (a) state surcharge of $10, (2) a Government Code section 70372, subdivision (a)(1) state court construction penalty of $15, and (3) a second Penal Code section 1465.8, subdivision (a)(1) court security fee of $20, and, as modified, the judgment is affirmed. The trial court is ordered to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.